limited service without the creation through constructive notice of a fictitious affirmative act on his part. Such a result is a wholly unnecessary, radical and unjust extension of the doctrine. If followed out logically, it would allow railroads to make use of a strategically advantageous position to overreach their patrons. For instance, they might discard their present lengthy bills of lading, issue simple receipts, and still bind the shipper without his knowledge by the mere filing of regulations with the Commission.

As to the rule that a filed schedule can only be attacked before the Commission it is submitted that there is no necessity of attacking the regulation at all. It is an attempt to effect a result which is in the nature of things impossible, that is, to enable one party to make a bilateral valuation agreement without the assent of the other party. The result is that the agreement as to valuation has not been made and therefore the common-law service is the basis of the shipment. To adjust the discrepancy between the service rendered and the rate paid, the railroad must collect the proper excess charges and thus avoid a discriminatory result.

DYING DECLARATIONS AS EVIDENCE IN CIVIL SUITS. — The Kansas Supreme Court has recently held that the dying declaration of a deceased person may be used in a civil case to prove any fact to which the declarant would be permitted to testify if living. *Thurston* v. *Fritz*, 138 Pac. 625. In so doing, it frankly overrules its own former decisions [1] and abandons the universally established doctrine that such declarations are admissible only on the issue of the guilt of some person charged with the homicide of the declarant.[2] The argument is that if such evidence is admitted to hang a man, there should be no hesitation in its use to sustain the taking of property.

It may be admitted that, in its present form, the dying declarations exception to the hearsay rule is anomalous. But whether the departure from principle consists in admitting the evidence in homicide cases or in confining it to that class is a question upon which writers disagree.[3] Professor Wigmore's opinion, adopted by the Kansas court, is that dying declarations were generally recognized as admissible for all purposes until about 1800, at which time the courts blundered into the present rule. It is submitted that the facts do not support this view.

While the hearsay rule was still taking shape, we find the declarations of dying men referred to as especially trustworthy,[4] but the precise extent to which they could be admitted seems to have remained in doubt long after the hearsay rule itself had crystallized. At least there was originally no settled practice under the hearsay rule of admitting

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[1] State *v.* Bohan, 15 Kan. 407; State *v.* O'Shea, 60 Kan. 772, 57 Pac. 970.

[2] Waldele *v.* New York Central & H. R. R. Co., 19 Hun (N. Y.), 69. See 1 GREENLEAF, EVIDENCE, § 156, 2 WIGMORE, EVIDENCE, §§ 1432 ff.

[3] See Professor Wigmore's able argument in favor of the rule adopted by the Kansas court. 2 WIGMORE, EVIDENCE, §§ 1430 ff. Also Mr. Chamberlayne's contention that the dying declaration exception is "discredited." 4 CHAMBERLAYNE, EVIDENCE, §§ 2819, 2859 ff.

[4] See 2 WIGMORE, EVIDENCE, § 1430, n. 1.

such declarations outside of homicide cases. Although we find counsel in 1744 referring to them as admissible generally,[5] another case in 1743 — in which plaintiff's counsel denied the existence of the whole hearsay rule — shows his opponent insisting that dying declarations are admitted only in criminal trials.[6] In 1761, the death-bed confession of a witness to a will that the document was forged, was offered as a dying declaration and as evidence to impeach the witness' attestation, and admitted.[7] Lord Mansfield, however, seems to have admitted it as a statement against interest. Though the case was twice cited for the competency of such a declaration to impeach the witness,[8] it was never afterwards referred to — judicially — as illustrating the dying declaration rule,[9] until Baron Parke, in 1836, put it on the latter ground in order to fortify himself in overruling it as an authority for the admissibility of declarations of deceased attesting witnesses, to contradict the assertions implied by the attestation.[10] One brief *dictum*, and two vague bits of judicial language, constitute the rest of the evidence that dying declarations were recognized as always admissible throughout the eighteenth century.[11] In 1820, and 1824, however, the rule was settled in substantially its present form by two short opinions which did not purport to overrule a single previous case or correct any current error.[12] Two contemporary texts,[13] and two American cases decided before 1820 [14] treat the admission of dying declarations in civil actions as a logical, but not yet established extension of the settled rule admitting them in trials for homicide. Thereafter, the extension is consistently repudiated everywhere.

The conclusion that dying declarations were ever generally recognized as excepted from the hearsay rule scarcely seems the most natural

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[5] Omichund *v.* Barker, 1 Atk. 21, 38.

[6] Annesley *v.* Anglesea, 17 How. St. Tr. 1140, 1161.

[7] Wright *v.* Littler, 3 Burr. 1244.

[8] Aveson *v.* Kinnaird, 6 East 188, 195. It is also explained on this ground in Doe d. Sutton *v.* Ridgway, 4 B. & Ald. 53, 55, and as a declaration against interest in King *v.* Mead, 2 B. & C. 605, 608. The principle that an attesting witness to a document, if dead, may be impeached by his own declarations contradicting the assertions implied by his attestation, was certainly recognized in England in the eighteenth century and is still law in the United States. Harden *v.* Hays, 9 Pa. St. 151; see Boylan *v.* Meeker, 28 N. J. L. 274, 294. But *cf.* Sewall *v.* Robbins, 139 Mass. 164, 29 N. E. 650. See 2 WIGMORE, EVIDENCE, §§ 1033, 1514. This principle furnishes an ample basis for the decision in Wright *v.* Littler.

[9] But it was cited for this rule by counsel in Doe d. Sutton *v.* Ridgway, *supra*, and King *v.* Mead, *supra*, and in MCNALLY, EVIDENCE, 386 (1802), and SWIFT, EVIDENCE, 125 (1810).

[10] Stobart *v.* Dryden, 1 M. & W. 615, 626.

[11] Rex *v.* Drummond, 1 Leach 337 (1784), contains a brief *dictum*, to that effect. Rex *v.* Woodcock, 1 Leach 500, 502 (1788), a homicide case, states the rule without noticing any limitation to such cases. The remarks in the Douglas Peerage case, 2 Hargr. Collect. Jurid. 387, 389, 397 (1769), were not only of the most cursory sort, but were addressed merely to the weight of evidence plainly admissible, and already before the court.

[12] Doe d. Sutton *v.* Ridgway, *supra*; King *v.* Mead, *supra;*

[13] MCNALLY, EVIDENCE, 381, 386 (1802); SWIFT, EVIDENCE, 124 (1810). The statement of the latter book on this point appears to be copied from the former and adds little to its authority.

[14] McFarland *v.* Shaw, 4 N. C. 200; 2 Carolina Law Repository, 102 (1814). See Jackson *v.* Vredenburgh, 1 Johns. (N. Y.) 159, 163 (1806).

one from this scanty evidence. It appears, rather, that these declarations were so familiar in homicide cases that they escaped the application of the hearsay rule, along with other common sorts of evidence; that when the resulting exceptions to that rule began to be reasoned about, it was widely argued that this one rested on a principle equally applicable to civil cases; but that the alleged general principle inspired so little confidence that when the courts were squarely asked to adopt the extension it was unanimously rejected, almost without a struggle.

That this should have been the outcome in 1800 is in itself strong evidence against the peculiar credibility claimed for dying declarations. To-day the increasing disbelief in divine vengeance, the obvious security from human retribution afforded by approaching death, and the great variety of motives to falsehood which may operate even upon a dying man,[15] make it still more difficult to justify the admission of dying declarations on any reasoning which does not call for the admission of all apparently honest declarations of persons whose testimony has become unavailable through death.[16] Furthermore, an apparent readiness to reconsider settled points of evidence necessarily encourages vexatious appeals; and the result in the principal case is to admit, without cross-examination, the testimony of the deceased party to a transaction while the mouth of his living adversary is closed by statute which the court cannot amend.[17] It would seem, therefore, that the adoption of this new rule of evidence, so sweeping, and of such debatable expediency, should be left to the consideration of the legislature.

STATE REGULATION OF THE SALE OF STOCKS, BONDS, AND OTHER INVESTMENT SECURITIES. — A recent decision holding invalid the Michigan statute popularly known as the "Blue Sky" law raises the interesting question of how far a state may regulate the sale of stocks, bonds, and investment securities. *Alabama & New Orleans Transportation Co.* v. *Doyle*, 210 Fed. 173. In the last few years there has been a large increase in the number of investment securities of speculative nature and uncertain value. And by means of branch investment houses and traveling salesmen, the market for them has come to include an ever increasing proportion of the public. The liberty to carry on any business is within the protection of the Fourteenth Amendment,[1] and any limitation on this liberty must be justified under the police power. Restrictions on liberty are proper if reasonably adapted to the securing of

[15] These motives may operate with more than ordinary force at a time when the opportunity to gratify revenge or affection is known to be slipping rapidly away. That they often do lead to falsehoods has been recognized. See 1 STEPHEN, HIST. CRIM. LAW, 448; Carver *v.* United States, 164 U. S. 694, 697, 17 Sup. Ct. 228, 230.

[16] This broad exception to the hearsay rule has been adopted by statute in Massachusetts. 1902 MASS. R. L. c. 175, § 66.

[17] 1909 KAN. GEN. STAT. c. 95, § 5914. This objection to the adoption of the rule in the principal case by decision is not confined to Kansas. Similar statutes prevail throughout the United States. They are collected in 1 WIGMORE, EVIDENCE, § 488.

[1] Allgeyer *v.* Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431; Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539; Adair *v.* United States, 208 U. S. 161, 28 Sup. Ct. 277.